In the

Supreme Court of the United States

October Term, 1976

No. 76-1315

ROBERT CALHOUN, JR.,

Appellant,

-against-

H. SPENCER KUPPERMAN, ESQ., CRAVATH, SWAINE & MOORE, its agents and others, THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD, its agents and others, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, its agents, Michael H. Diamond, Henry P. Baer, J. Phillip Adams, Peggy L. Kerr and others, FREEMAN, MEADE, WASSERMAN & SHARFMAN, its agents and others,

Appellees,

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION TO DISMISS OR AFFIRM

JAMES F. GLEASON, JR.,
One Chase Manhattan Plaza,
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Attorney for Appellee
Cravath, Swaine & Moore

April 15, 1977.

In the

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ROBERT CALHOUN, JR.,

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1)(a) and (c) of the Rules of this Court, appellee Cravath, Swaine & Moore moves that the appeal be dismissed or, in the alternative, that the judgment of the United States Court of Appeals for the Second Circuit be summarily affirmed.

STATEMENT

This is an appeal, pro se, by Robert Calhoun, Jr., husband of Alice M. Calhoun, from the judgment of the United States Court of Appeals for the Second Circuit affirming, on the opinion below, a judgment of the United States District Court for the Southern District of New York dismissing the action for failure to state a claim upon which relief could be granted. Copies of the judgment of the court of appeals and the unreported opinion of the district court are appended to the Jurisdictional Statement at pages 19 and 23, respectively.

A. Prior Action

On June 21, 1971, Alice M. Calhoun filed a complaint in the District Court for the Southern District of New York against her employer, Riverside Research Institute ("Riverside"), and another defendant, alleging that she had been denied a promotion by Riverside because of her race. Alice M. Calhoun v. Riverside Research Institute, 71 Civ. 2734. Cravath, Swaine & Moore, an appellee herein, appeared as attorneys for Riverside until April 7, 1972, when another firm was substituted for it with Riverside's consent and the court's approval. Cravath, Swaine & Moore did not participate in the proceedings in any way after the substitution. A copy of that consent and order (which was included in the appendix to the Brief for Defendant-Appellee Cravath, Swaine & Moore by leave of the court of appeals granted August 20, 1976) is appended

hereto.

Over two years after that substitution had taken place, Alice Calhoun and Riverside settled their action for $5,900 at a conference before the district court on June 26, 1974, and a stipulation and order of discontinuance was filed July 2, 1974. As shown by the transcript of that hearing, a portion of which is quoted in the district court's opinion, it appears that Mrs. Calhoun was satisfied with the settlement and understood that it was final.

B. Proceedings Herein

Appellant herein, Alice M. Calhoun's husband, charged that all the attorneys who had occasion to appear in Alice M. Calhoun v. Riverside, even during the preliminary stages of that action, conspired and "caused his wife to lose the damages that were warranted in her action", resulting in consequent injury to him. He invoked the Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964, as amended, as the bases of the district court's jurisdiction, and purported to bring his action under 42 U.S.C. §§ 241 and 242.

The district court dismissed appellant's action on the ground that, "[s]ince plaintiff lacks standing, the complaint fails to state a claim upon which relief can be granted."

The court explained its reasoning as follows:

> "It is the general rule that an individual cannot sue for the deprivation of another's civil rights. McGowan v. Maryland, 366 U.S. 420, 429 (1961); Evain v. Conlisk, 364 F. Supp. 1188 (N.D. Ill.), aff'd, 498 F.2d 1403 (7th Cir. 1974). Only Mrs. Calhoun is in a position to raise any wrongs done to her. The statement that Mr. Calhoun was in turn harmed does not cure this defect."

The court of appeals affirmed the dismissal on the district court's opinion, and appellant seeks reversal of the judgment of affirmance.

ARGUMENT

Since the court of appeals did not hold any statute unconstitutional, an appeal does not lie from its judgment. See 28 U.S.C. §§ 1252, 1254(a).

Appellant, however, now purports to "appeal" pursuant to 28 U.S.C. § 1254(1), which provides for review of cases in the courts of appeals by writ of certiorari. Given the obvious improvidence of the appeal, this Court is empowered to treat the papers upon which it was taken as a petition for a writ of certiorari. 28 U.S.C. § 2103. This case, however, presents no important question of federal law, involves no conflict of the decision of the court of appeals with any other decision and patently involves no deviation from the accepted and usual course of judicial proceedings that should cause this Court even to consider exercising its power of supervision.

I

NO IMPORTANT QUESTION OF FEDERAL LAW OR CONFLICT OF DECISIONS IS PRESENTED.

Appellant, who admits to have sued appellees for allegedly "defrauding his wife, Alice M. Calhoun, of the benefits of her civil rights lawsuit" (Jurisdictional Statement, 3), is so plainly the wrong person to seek redress for the alleged wrong that no question of federal law is raised and no conflict of decisions is presented.

Nowhere in the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h, a statute dealing with an entirely different area of concern, does there appear a predicate for the claim asserted by appellant.

On its face, Section 1983 of Title 42 permits claims only by persons who, under color of state action, are deprived of federally conferred rights. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). If anyone was deprived of a federally conferred right in Alice M. Calhoun v. Riverside, a federal action, it was Alice M. Calhoun, not appellant, and any such deprivation was surely not under color of any state statute, ordinance, regulation, custom or usage.

Moreover, in part because of the "case or controversy" requirement of Article III of the Constitution, a party may not rely on a violation of the rights of another person to support a claim or a defense. McGowan v. Maryland, 366 U.S.

420, 429 (1961); Barrows v. Jackson, 346 U.S. 249, 255-57 (1953); see O'Shea v. Littleton, 414 U.S. 488, 493-496 (1974). A person such as appellant suing under Section 1983 may not assert a claim based upon deprivation of another's rights. Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Evain v. Conlisk, 364 F. Supp. 1188, 1190 (N.D. Ill.), aff'd without opinion, 498 F.2d 1403 (7th Cir. 1973).

It is settled that Sections 241 and 242 of Title 18 are penal statutes that do not provide a basis for civil liability. E.g., United States ex rel. Savage v. Arnold, 403 F. Supp. 172, n. 1 at 173 (E.D. Pa. 1975); Brown v. Duggan, 329 F. Supp. 207, 209 (W.D. Pa. 1971).

It is thus beyond peradventure that appellant is without standing and stated no claim over which the district court had jurisdiction or upon which he could have been granted relief. This appeal thus raises no important question of federal law, if any question at all, involves no conflict of decisions and is entirely without merit.

II

THE PROCEEDINGS BELOW WERE CONDUCTED IN THE ACCEPTED AND USUAL COURSE, PROVIDING NO BASIS FOR THE INVOCATION OF THIS COURT'S SUPERVISORY POWERS.

There is simply no basis in the record for appellant's claim that aspects of the proceedings below were conducted fraudulently (see Jurisdictional Statement, 8).

It is particularly preposterous for appellant to charge appellee Cravath, Swaine & Moore with fraud in this action or in Alice M. Calhoun v. Riverside since other attorneys for Riverside had been substituted in place of Cravath, Swaine & Moore over two years before the time of the settlement of which appellant complains and, as the transcript of the settlement hearing shows, no one from Cravath, Swaine & Moore was present at the hearing.

Since Cravath, Swaine & Moore did not participate in the events complained of, there is all the more reason for affirming the judgment of the court of appeals with respect to it.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Court lacks jurisdiction over the appeal and that the questions presented by appellant are, in any event, completely lacking in merit. If this Court determines to treat appellant's papers as a petition for a writ of certiorari, the Court should deny certiorari or, in the alternative, summarily affirm the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JAMES F. GLEASON, JR.,
Attorney for Appellee
Cravath, Swaine & Moore

April 15, 1977

APPENDIX

U.S. DISTRICT COURT
FILED APR 18 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALICE M. CALHOUN, Plaintiff, -against- RIVERSIDE RESEARCH INSTITUTE and COLUMBIA UNIVERSITY, Defendants.	CONSENT TO SUBSTITUTION OF ATTORNEYS Index No. 71 Civ. 2734 H.R.T.

IT IS HEREBY CONSENTED AND AGREED that Messrs. Meade, Wasserman & Plowden-Wardlaw of 551 Fifth Avenue, New York, New York 10017, be, and they hereby are, substituted in the place and stead of Cravath, Swaine & Moore of 1 Chase Manhattan Plaza, New York, New York 10005, as attorneys for Riverside Research Institute in the above-entitled action.

April 7, 1972

s/ Cravath, Swaine & Moore
Attorneys for Riverside
Research Institute

RIVERSIDE RESEARCH INSTITUTE
By s/Lawrence H. O'Neill

So Ordered. April 17, 1972
s/ H.R. TYLER, JR.
USDJ

[Acknowledgement omitted.]